In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF THE UNITED STATES OF AMERICA, APPELLEE

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STATEMENT OF THE CASE

The facts in the case at bar are substantially those as set forth on Page 2 of Appellant's brief. This matter is on appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, making a judgment *nisi* on a bail forfeiture absolute.

An answer was filed by the National Surety Company, surety on the bond, and, the issues having been joined, the case came on for hearing before Judge Neterer.

ARGUMENT

The decisions cited on Page 6 of Appellant's brief, holding that *scire facias* on a bail bond is a commencement of the civil action, are apparently the law.

I.

On page 8 of appellant's brief it is contended that plaintiff in this case, at the trial in the lower court, failed to prove that the surety was called to produce the defendant. The Government's answer with reference to this contention is simply that it is not now, or never has been, necessary to call the surety to produce the defendant, or even necessary to give the surety notice to produce the defendant.

In support of appellant's contention, he cites a quotation from 3 R. C. L., Page 62, Section 75, which states in substance that where a recognizance is in form several rather than joint, it is necessary to call the surety. Such citation, however, is not applicable here.

The bond in the first paragraph states that the principal and surety obligate themselves jointly and severally (Tr. 19). In *Southern Surety Company vs. The United States*, 23 Fed. 2d, 55, it was held that it was no defense to the forfeiture that the surety was not called to produce the principal or that the bond was not forfeited at all as against the defendant surety.

At 6 C. J. 1046, we find the following statement: "It has been held that if there has been a default on the part of the principal, he is the only one to be called and notified and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them, unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day bail is forfeited."

II.

On page 9 of appellant's brief it is stated that plaintiff failed to prove the judgment *nisi* as alleged, and on into page 10, it is contended that the minute entry offered in evidence as follows: "the bail is forfeited nisi and bench warrant issue," (Tr. 17) was not sufficient as it does not mention against whom the judgment was

rendered, nor the amount, nor does it have any of the other requisites of a judgment *nisi* sufficient to sustain a scire facias.

It is contended by the Government that the authorities cited by counsel for appellant do not bear out appellant's contention, and it is contended also that the following authorities cited by the Government are pertinent and should leave no doubt in the court's mind as to this contention on the part of the appellant.

In *Southern Surety Company vs. United States of America*, 23 Fed. 2d, 55, the final judgment was entered although no forfeiture was ever alleged against the surety company. It was held, that it was not necessary to plead or prove a judgment nisi as against a surety on a bail bond at the time of a trial of the forfeiture of the same.

In *People vs. Tidmarsh*, 113 Ill. App. 153, it was held that an order as follows: "and now it is by the court ordered that recognizance herein be, and is now forfeited," was held a sufficient formal declaration of a forfeiture. To the same effect is the case of *Banta vs. The People,* 53 Ill. 434. In the *Banta* case the court held that an order of forfeiture as follows was held proper: "It is, therefore, considered by the court that

the recognizance of the said defendant be, and is hereby declared to be forfeited and that the default of said defendant and of his securities be entered of record and that scire facias issue herein against the said Jonathan Way and Jordan Banta and Tilman Lane, returnable to the next term of this court requiring the said defendant and his securities then and there to appear to show cause why the People should not have judgment and execution upon their said recognizance according to its form in force and effect thereof."

In *State vs. Eyermann*, 72 S. W. 539, it was held that it is not necessary that an order declaring a forfeiture of a recognizance state the amount of the forfeiture, especially in view of Revised Statute 1899, Section 2800, providing that a proceeding on a recognizance shall not be defeated on account of any defect of form or other irregularity. This case also held that where the accused had two bail bonds for his appearance for different cases, it was not necessary for the judgment *nisi* to plead which one was forfeited.

In connection with the *Eyermann* case cited above, the Government at this time wishes to call to the court's attention Remington Compiled Statutes of the State of

Washington, 1922, Section 777, which provides in substance that no forfeiture of any bail bond shall fail for any minor defect or other irregularity.

III.

On Page 11 of appellant's brief, appellant begins with a contention that the uncontradicted record and evidence affirmatively shows that Burns fully complied with the terms of his bond and that no default was made. It is contended by the appellant that the bond offered in evidence is not conditioned for the appearance of the defendant on the same date as the offense charged in the information. It is evident from the record herein (Tr. 16) that there was no objection on the part of the appellant herein to the admission of the bail bond in evidence when said bail bond was offered by the Government (Tr. 16). If there is a variance between the bond and the information, the defendant waives the variance and acknowledges the same is not fatal by failure to object to the bond at the time it was offered in evidence. 6 C. J. 1073, *Wellborn vs. The People*, 76 Ill. 516. Appellant contends that the bond was to answer an offense committed on or about November 21, 1924, and that, inasmuch as there was no charge ex-

isting against the defendant after October 16, 1924, there was a fatal variance between the information and the bond.

It often happens that bail bonds are signed prior to the time that the indictment or information is filed against the defendant. Thus in many times and cases it is impossible to indict or inform against the defendant on all counts for crimes for the exact date mentioned as the date of commission of the various crimes in the bond. See *Wells vs. Terrell,* 49 S. E. 319.

At 6 C. J. 1002, we find the following statement:

"The fact that the description of the offense in the bail bond or recognizance varies from that set forth in the information or indictment will not avoid the undertaking if it in substance describes the offense charged."

In *Blaine vs. State,* 31 S. W. 366, it was held that where a bail bond erroneously stated the date of the indictment under which the accused stood charged, the mistake was immaterial.

In *People vs. Richardson,* 187 Ill App. 634, it was held that where a bail bond was given on October 15, 1912, requiring the appearance of the accused at the next term of court to be held on June 6, 1912, instead

of 1913, the mistake could not render the bond a nullity; and it was also held that the parties to the criminal action were bound to know at their peril which was the first day of the next term.

IV.

On page 13 of appellant's brief, it is contended that in any event the bond is discharged because the charge brought against Burns was different than the charge covered by the bond. We believe that our argument with reference to the last point herein sufficiently answers the contention of the appellant herein and proves that there is not, in the case at bar, a fatal variance between the bond and the information herein. It is believed that the appellant has waived his rights to object on the ground of a fatal variance in this case, on account of the fact that when the bond was offered in evidence in this case (Tr. 16) no objection was made by the appellant.

In *Lewis vs. State*, 39 S. W. 570, it was held that an objection that there is a variance between the bond and the recitals in the writ of scire facias is waived unless there is an objection to the admission of the bond in evidence.

Where the offenses are different degrees of the same class or where the indictment is for an offense of a higher grade than that described in the undertaking and includes the latter offense, or arose out of the same act or transaction, the bail are not released, 6 C. J. 1030.

It is the Government's contention in this case that there is no fatal variance between the bond and the information herein, on account of the fact that both charged offenses in violation of the National Prohibition Act and both the offenses in the bond and the offenses alleged in the information arise out of the same act and transaction and therefore the surety on the bond in the case at bar is not released.

V.

On page 14 of appellant's brief it is contended that the bond in the case at bar was discharged for failure to call the defendant at any proper time. It has been stated in appellant's brief that the bond in the case at bar was a one term bond and did not contain the "term to term" condition and it required the defendant to appear during the November, 1924, term. Counsel for appellant cites cases holding that a bond conditioned for appearance at a specified term, which does not contain the condition to appear from "term to term" does

not bind the surety after the time specified. *United States vs. Mace*, 281 Fed. 635; *United States vs. Keiver*, 56 Fed. 422; *Joelson vs. United States*, 281 Fed. 106.

The Government at this time wishes to call the court's attention to the case of *The United States vs. Duke*, 5 Fed. 2d 825, decided by Judge Neterer, which is a forfeiture of a bail bond. The *Joelson* and the *Mace* cases are analyzed and discussed.

In the *Duke* case Judge Neterer held that a surety on a bond conditioned that the defendant would appear at a term of court "to be begun and held on the first day of February, 1924," was held liable on defendant's failure to appear at the May term of court, though there was no term held in February. In view of Remington's Compiled Statutes of the State of Washington, 1922, Section 1957, it was held the statute became part of the bond and required that the defendant appear to answer charges against him at all times until discharged, according to law.

Section 1957, Remington's Compiled Statute of the State of Washington, 1922, provides as follows: "The recognizance shall be conditioned in effect that the defendant will appear to answer said charge whenever

the same shall be prosecuted and at all times until discharged, according to law, render himself amenable to the orders and process of the Superior Court and if convicted, render himself in execution of the judgment." It is pointed out by the court in the *Duke* case that the statute mentioned herein became a portion of the bond, which in effect was a contract between the Government and the surety to produce the defendant, not at any term of the court "but at all times until discharged according to law."

The *Mace* and *Joelson* cases are distinguished and held not to be in point because the interpretation of the bonds in said cases was governed by the respective statutes of the states in which the bonds were executed.

A bail bond which requires the defendant to appear from time to time means just the same as if term to term were specified. *The United States vs. Fletcher*, 279 U. S. 163.

In the case of *United States vs. Davenport*, 266 Fed. 427, it was held there seems no reason for a strict or highly technical construction of law in failure of the defendant, and that this kind of action does not involve the guilt or innocence, conviction or acquittal of anyone. It is not a criminal case. Upon the failure of the prin-

cipal to appear, the sureties become debtors. *United States vs. Sanges*, 144 U. S. 310, 36 L. Ed. 445; *United States vs. Zarafonitis*, 150 Fed. 97, 80 C. A. A. 51.

It would therefore seem that the principal in the case at bar was called at a proper time.

VI.

On page 16 of appellant's brief it is contended that the bail is discharged under the state laws. The Government admits that the conditions of a bail bond in the federal court are governed by the laws of the state in which the bond is executed. Two state statutes are cited in appellant's brief; the first one is as follows: Remington's Compiled Statutes, 1922, Section 2311, which provides: "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed unless good cause to the contrary be shown."

Remington's Compiled Statute, 1922, Section 2312, provides: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty

days after the indictment is found or the information filed, the court shall order it to be dismissed unless good cause to the contrary is shown."

In the case at bar, it is contended that inasmuch as the information was not filed within thirty days after the arrest of the defendant and, inasmuch also as the defendant was not brought to trial within sixty days after the information was filed, the surety on the bond in question is released, and the above mentioned statute inured to the benefit of the surety.

In substantiation of the appellant's contention the following cases are cited: *State vs. Lewis*, 35 Wash. 261; *State vs. Caruso*, 137 Wash. 519.

Neither of these cases is in point. However, an examination of both of them will show that in both, the information against the defendants was dismissed and that such a dismissal inured to the benefit of the surety. In the case at bar the information has not been dismissed and the record shows affirmatively that no motion for the dismissal of the same for want of prosecution was ever interposed.

Remington's Compiled Statute, 1922, Section 1957, already quoted herein, provides in substance that the bond is effective until defendant is discharged accord-

ing to law. In the case at bar, the defendant was never dismissed from the the information filed against him in the federal court prior to or after the forfeiture of his bail bond for his appearance at the time of sentence.

Remington's Compiled Statute, 1922, Section 2313, provides that: "Whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail should be exonerated and if money has been deposited instead of bail, shall be refunded to the principal depositing the same."

Can it not be inferred from the above mentioned statute that the only method in the state court of exonerating bail bonds is by the dismissal of the main criminal charge against the main defendant.

In *United States vs. Davenport*, 266 Fed. 427, it was held: "It is no defense to the surety on the defendant's bond that the criminal prosecution against the defendant is barred by time," the court holding the sureties undertaking is to answer for the appearance of the defendant, and the sureties' obligation is not affected by the question of whether or not the defendant's criminal prosecution is barred by the statute of limitations.

To the same effect is a case in the Ninth Circuit, *United States vs. Dunbar,* 83 Fed. 151. On page 154 of said decision the court stated as follows:

"Whether the offenses with which William Dunbar were charged were barred by lapse of time could only be determined in the prosecution against him. The undertaking of the sureties was to answer for his appearance. That obligation did not at all depend upon or involve the question of whether the prosecution of the respective offenses was barred by lapse of time."

Recurring to the general principle that the condition of the recognizance should be performed it follows that if the principal fails to appear according to the obligation, the bond or recognizance is forfeited whether or not there is an indictment or information, for ordinarily the discharge is a matter for the court and does not result as from course from failure to indict or to proceed by information; and this rule governs where, upon failure to indict, the accused is ordered to appear before a second Grand Jury. 6 C. J. 1028.

In view of the foregoing citations it is submitted that appellant's contention that the bail herein is discharged under the state laws is without any merit whatsoever.

VII.

On page 18 of appellant's brief it is contended that recovery was erroneously granted the plaintiff herein on account of the fact that the bond produced was conditioned differently than the bond sued on. Inasmuch as the bond produced was not a term to term bond, and the writ herein alleged a term to term bond, appellant contends that this was a fatal variance. In the cases of *United States vs. Duke, supra;* and *United States vs. Fletcher, supra,* it was held that the words term to term are not necessary in a bond to grant recovery. In the cases here the facts are parallel to the facts in the case at bar. Therefore it is contended by the Government in this case that the words "term to term" are an unnecessary portion of the writ herein and can be ignored as superplusage.

A variance which could not have surprised or prejudiced the adverse party could not be contended as material. 6 C. J. 1070.

It is the Government's contention also that counsel cannot, at this time, raise a question of variance between the writ and the bond offered in evidence when no objection was made to the admission of the bond in

evidence. See *Lewis vs. State*, 39 S. W. 570; 6 C. J. 1073; *Wellborn vs. People*, 76 Ill. 516.

It will be seen that the defendant at the time of trial herein did not object to the admission of the bond in evidence (Tr. 16).

The appellee also contends vigorously that on an appeal from the judgment of the lower court as in this case, the appellant has waived his right to have the upper court decide whether or not the evidence before the lower court was sufficient to sustain the judgment, on account of the fact that after the defendant moved for a nonsuit at the end of plaintiff's case, defendant introduced defense testimony and failed to renew his motion for nonsuit or for dismissal at the end of all the testimony. According to the decisions of the Federal Courts, which are legion on this point, the insufficiency of the evidence cannot be questioned above, when the motion for nonsuit by the defendant has not been renewed at the end of the defendant's case. *Gilson vs. F. S. Royster Guano Company*, 1 Fed. 2d 82; *Columbia and Puget Sound R. R. Co. vs. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405; *Bunker Hill Mining Company vs. Poka*, 7 Fed. 2d 583, 4 C. J. 960; *American Railroad Company of Porto Rico vs. Santiago, et al.*, 9 Fed. 2d 753.

It is also contended by the Government that the appellant herein did not properly except to the findings which are included in the judgment herein and did not but should have excepted separately to each of said findings in accordance with the proper rules of procedure. It will be borne in mind by the court that this was a non-jury trial and that the court evidently included his findings in the judgment (Tr. 8).

Before closing, the Government also wishes to point out to the court the well settled rule in the State of Washington with reference to a motion for non-suit. In the case of *Jordan vs. Spokane, etc., Ry. Co.*, 109 Wash. 476, we find the rule stated as follows: "This appeal is from a judgment of nonsuit entered at the close of plaintiff's case, and in order to sustain judgment it must appear as a matter of law that there is neither evidence nor reasonable inference therefrom which would have sustained a verdict in defendant's favor. *Godefroy vs. Hunt*, 93 Wash. 371, 160 Pac. 1056; *Fobes Supply Company vs. Kendrick*, 88 Wash. 284, 152 Pac. 1028."

It would seem apparently from the above quotation from the *Jordan* case that the motion for non-suit in the case at bar was properly denied on account of the

fact that it did appear at the time of trial herein that there was evidence or inference therefrom which would have sustained a judgment in plaintiff's favor.

In view of all the foregoing, it is respectfully contended that the judgment of the lower court should be affirmed.

Respectfully submitted

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